(21,725.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 249.

SPENCER S. WOOD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 4, 1911.

1 In the Court of Claims.

No. 30334.

SPENCER S. WOOD
v.
THE UNITED STATES.

I. *Petition.*

(Filed February 1, 1909.)

To the Honorable the Court of Claims:

The Claimant, Spencer S. Wood, respectfully represents:

1. The claimant entered the United States Navy on the 28th day of June, 1878, and has continuously served therein until the present time. He was appointed lieutenant-commander on the 18th of July, 1903, and commander on the 13th day of October, 1907. During the time covered by this claim he was, prior to the 13th day of October, 1907, a lieutenant-commander of more than twenty years' service in the navy and from and after that date a commander of more than twenty years' service in the navy.

2. On the first day of October in the year 1904, he was ordered to duty as aid to the admiral of the navy by the following order:

"Proceed to Washington, D. C., and report to the Admiral of the Navy, George Dewey, President of the General Board, on October 17th, 1904, for duty as Aid to the Admiral of the Navy, and for duty in connection with the General Board.

"This employment on shore duty is required by public interests.

Respectfully, CHARLES H. DARLING,
Acting Secretary."

3. He continued on duty as aid to the admiral from the 17th day of October, 1904, when he reported and entered upon duty, until the 29th day of February, 1908, when by orders issued by the
2 Secretary of the Navy he was detached therefrom and assigned to other duty.

4. While serving as aid to the admiral as aforesaid, he received no additional or higher pay than that appertaining to his commission in the navy, to wit:

From October 17, 1904, to June 28, 1906, the pay of a lieutenant-commander of more than 20 years' service in the navy, corresponding to a major in the army, that is $3500 a year, diminished by 15% on account of the duty being on shore, as required by Section 13 of the Navy Personnel Act (30 Stat. L. 1007) ..... $2975 a year
except January 8-10, 1905, on sea duty (no diminution) ..... 3500 " "
From June 29, 1906, to October 12, 1907, the pay of a lieutenant-commander of more than 20 years' service in the navy, corresponding to a major in the army ..... 3500 a year
but without deduction on account of shore duty, the provision for such deduction having been repealed by act of June 29, 1906 (34 Stat. L. 554).
From October 13, 1907, to the date of his detachment, February 29, 1908, the rate of pay allowed by law to a commander of more than 20 years' service in the navy, corresponding to a lieutenant-colonel in the army, amounting to ..... 4000 a year
(without deduction on account of shore duty).

5. By Section 1096 of the Revised Statutes, the general of the army may select aids who shall have, while serving on his staff the right to the pay of a colonel of cavalry. By section 1261, the pay of a colonel is $3500 a year with 10% increase for longevity for each five years of service, under Section 1262, but by Section 1267, not to exceed $4500. By the act of March 3, 1899, Section 13, 3 (30 Stat. L. 1007) commissioned officers of the line of the navy are entitled to the same pay and allowances as are or may be provided by law for officers of corresponding rank in the army, with deduction of 15% for shore duty up to June 29, 1906, from and after which date the provision of law for such deduction was repealed (34 Stat. L. 554). By reason whereof, the claimant is entitled, during the whole of the period aforesaid, to pay as a colonel in the army, or captain in the navy, of more than twenty years' service, as follows:

From October 17, 1904, until June 28, 1906, $4,500 a year, less 15% for shore duty, amounting to..... $3,825 a year
Except January 8-10, 1905, sea duty, no diminution.. 4,500 a year
From June 29, 1906, to February 29, 1908, at the rate of ..... 4,500 a year
(without deduction for shore duty).

6. While the claimant was on shore duty from October 17, 1904, to February 29, 1908, he received commutation of quarters, there being no public quarters where he was on duty, as due to an officer of the grade of his commission, at the rate of $12 per room per month, for 4 rooms, until March 1, 1907, and for 5 rooms, as pro-

vided by act of March 2, 1907. (34 Stat. L. 1169) with heat and light for the same as provided by the same act (34 Stat. L. 1167) until October 12, 1907, and from and after October 13, 1907, when he became a commander, 6 rooms, with heat and light for the same, until the date of his detachment, February 29, 1908.

Instead of the same, he should have received commutation for quarters as a captain in the navy, corresponding to a colonel in the army, at the rate of 5 rooms to March 1, 1907, and from and after March 2, 1907, in accordance with the provisions of said act of March 2, 1907, (34 Stat. L. 1167, 1169) 7 rooms, with heat and light for the same.

4 The difference for the commutation of quarters would be the following difference per month:

From October 17, 1904, to March 1, 1907, 1 room, difference, or	$12 a month.
From March 2, 1907, to October 12, 1907, a difference of 2 rooms, or	$24 a month.
From October 13, 1907, to February 29, 1908, a difference of 1 room or	$12 a month.
Amounting for commutation of quarters in all to	$600.

The difference for commutation of fuel and light at claimant's station, Washington, between 36 and 43 degrees north latitude, would be, per room per month (Army Regulations, §§ 1045-1069);

Between May 1, to August 31—	
1 cord wood or equivalent in other fuel	$4.00
900 cubic feet gas @ $1.10 per M feet (or equivalent in other illuminant)	.99
	$4.99
At other seasons—	
1 5/16 cords wood @ $4	$5.25
1500 cubic feet gas @ $1.10 per M feet	1.65
	$6.90

At the above rates, there is due claimant for commutation of fuel and light, $125.00.

7. The amount of difference of pay between what he has already received and what he should have received as a colonel, as aforesaid, amounts for his entire period of service to	$3,000.
And the difference for commutation of quarters amounts to	600.
And the difference for commutation of fuel and light for said quarters since March 2, 1907, is	125.
A total of	$3,725.

which amount he claims.

8. A claim similar to this was presented by another officer
5 to the Auditor of the Treasury for the Navy Department, by whom the same was allowed, but on a revision of the account by the Comptroller of the Treasury, the decision of said auditor was reversed and said claim disallowed.

6 No assignment or transfer of this claim, or any part thereof or interest therein, has been made; and the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States. And the claimant prays judgment in the sum of three thousand, seven hundred and twenty-five (3,725) dollars.

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

STATE OF PENNA.,
County of Phila., ss:

Spencer S. Wood being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

SPENCER S. WOOD,
Signature of Claimant,
Commander, U. S. Navy.

Subscribed and sworn to before me this 29th day of January, 1909.

[SEAL.] CHARLES A. DILLAN,
Official Signature,
Notary Public.
Official Title.

Commission expires Jan. 18th, 1913.

7 II. *General Traverse.*

Filed June 9, 1909.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN Q. THOMPSON,
Assistant Attorney-General.

8 III. *Submission.*

This case was submitted by Mr. George A. King for the claimant, and by Mr. Frederick De Courcy Faust for the defendants, on the 10th day of June, 1909.

9 IV. *Findings of Fact and Conclusion of Law.*

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

Findings of Fact.

I.

The following is a copy of the claimant's orders dated October 1, 1904, ordering him to duty as Aid to the Admiral of the Navy:

"NAVY DEPARTMENT,
WASHINGTON, *October* 1, 1904.

SIR: Proceed to Washington, D. C., and report to the Admiral of the Navy, George Dewey, President of the General Board, on October 17, 1904, for duty as Aid to the Admiral of the Navy, and for duty in connection with the General Board.

This employment on shore duty is required by the public interest.

Respectfully, CHAS. H. DARLING,
Acting Secretary."

The indorsement on the order shows that claimant reported October 17, 1904.

The following is a copy of the order detaching him from duty as Aid to the Admiral of the Navy, dated February 25, 1908:

"NAVY DEPARTMENT,
WASHINGTON, *February* 25, 1908.

SIR: On February 29, 1908, you will regard yourself detached from duty as Aid to the Admiral of the Navy, duty in connection with the General Board, Washington, D. C., and from such other duty as may have been assigned you; will proceed to the works of William Cramp and Sons Ship and Engine Building Company, Philadelphia, Pa., for such duty in connection with the fitting out of the 'Idaho,' and for duty as Executive Officer of that vessel when placed in commission.

10

Report, by letter, to the Commandant of the Navy Yard, League Island, Pa., for this duty.

This employment on shore duty is required by the public interest.

Respectfully, V. H. METCALF, *Secretary.*"

The claimant served as aid to the admiral of the navy under the above orders from the 17th day of October in the year 1904, to the 29th day of February in the year 1908, being all that time on shore duty, with the exception of the 8th, 9th, and 10th days of January, 1905, on which last mentioned days he was on sea duty.

II.

If the claimant is entitled to the increased pay while serving as aid to the Admiral of the Navy, and the allowance of commutation of quarters of a colonel in the Army, there would accrue to him as difference of pay and commutation of quarters the sum of three thousand four hundred and ninety-five dollars and sixty-two cents ($3,495.62); and if entitled to the commuted value of the heat and light for said quarters in pursuance of the act of March 2, 1907 (34 Stat. L. 1167) as made applicable to the navy by the 13th section of the Personnel Act, to the additional amount of sixty-four dollars and seventy-one cents ($64.71) making a total of three thousand five hundred and sixty dollars and thirty-three cents ($3,560.33).

Conclusion of Law.

Upon the foregoing findings of fact the court decides as
11 a conclusion of law that the claimant is not entitled to recover and his petition is therefore dismissed.

12 V. *Final Judgment.*

At a Court of Claims held in the City of Washington, D. C., on the 10th day of June, 1909, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendant and do order, adjudge and decree that the petition of the said Spencer S. Wood be, and the same is hereby, dismissed.

BY THE COURT.

13 VI. *Claimant's Application for, and Allowance of, Appeal.*

From the judgment rendered in this cause on the 10th day of June, 1909, dismissing the petition, the claimant, Spencer S. Wood, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

Allowed in Open Court, June 10, 1909.

14 In the Court of Claims.

30334.

SPENCER S. WOOD
vs.
UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the Court of the judgment of the Court dismissing the petition of the claimant Spencer S. Wood, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 14th day of June, 1909.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

Endorsed on cover: File No. 21,725. Court of Claims. Term No. 249. Spencer S. Wood, appellant, vs. The United States. Filed June 15th, 1909. File No. 21,725.

8

Office Supreme Court, U. S.
FILED.
JUN 22 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 71.

SPENCER S. WOOD,
Appellant,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellant.

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Supreme Court of the United States.

October Term, 1911.

SPENCER S. WOOD, *Appellant*,
v.
THE UNITED STATES. } No. 71.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

I. Statement of the Case.

This is a claim of an officer of the Navy of the rank successively of lieutenant-commander and commander in the Navy to be paid while serving as aid to the Admiral of the Navy at the rate of pay allowed by law to a captain. The claim is based upon the provisions of statutes relating to the Army—Rev. Stat. §§ 1096, 1261, 1262, 1267—which allow the pay of a colonel—corresponding in rank to a captain in the Navy—to an officer while serving as aid to the General of the Army, with whom the Admiral of the Navy corresponds in rank. The office of Admiral of the Navy after being in abeyance for some years was re-established by the act of March 2, 1899, 30 Statutes at Large, 995, re-enacted in identical terms by a portion of the Naval Appropriation Act of March 3, 1899, 30 Statutes at Large, 1045. By another provision of the same act, 30 Statutes at Large, 1024, 1025, his "pay and allowances shall be the same as those received by the last General of the United States Army." The 13th Section

of the Navy Personnel Act (30 Statutes at Large, 1007), provides:

"That, after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The findings of the Court of Claims, record, pages 5, 6, show that the claimant served under orders of the Secretary of the Navy as aid to Admiral George Dewey, from October 17, 1904, to February 29, 1908. If he is entitled to the increased pay allowed by law to a colonel in the Army, together with commutation of quarters and commuted value of heat and light for such quarters allowed by law to a colonel, he would receive in addition to the pay which he has already received, the sum of $3,560.33.

The court held that he was not entitled to be paid as claimed, and dismissed the petition. The claimant appealed to this court (record, p. 6).

II. Assignment of Error.

The appellant hereby assigns for error that said Court of Claims refused to allow to him the pay and allowances of a colonel in the Army while the appellant was serving as an aid to the Admiral of the Navy and dismissed his petition.

III. Brief of Argument.

Action of Treasury Officers.

The Court of Claims delivered no opinion. It is therefore impossible to state on what grounds the benefit of the 13th Section of the Personnel Act allowing to officers of the Navy the pay and allowances of officers of the Army (30 Statutes at Large, 1007), was refused.

The question involved in this case has been before the accounting officers of the Treasury, who have differed in opinion thereon. The Auditor for the Navy Department held that such an aid was entitled to the increased pay which he claimed. This decision was overruled by the Comptroller of the Treasury, who held that the officer was not so entitled. The decisions of these officers are printed in the decisions of the Comptroller of the Treasury, Volume 11, pages 733 to 741. We quote the material portions of these.

Decision of Auditor for Navy Department.

(11 Comptroller's Decisions, 734–737.)

After setting forth the facts in the case of Lieutenant Henry H. Caldwell, whose case was then under consideration, the Auditor thus quotes the

Statutes and Regulations.

" Section 1096 of the Revised Statutes:

" ' The General of the Army may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry.'

" Section 1261 of the Revised Statutes:

" ' The pay of a colonel is fixed at $3,500 per annum;' and by section 1262 each commissioned officer below the rank of brigadier-general is entitled ' * * * 10 per centum of their current yearly pay for each term of five years.' Section 1267: ' In no case shall the pay of a colonel exceed $4,500 per year, * * *.'

" The Chief of the Bureau of Navigation, under date of February 20, 1905, informed this office that ' The Bureau knows of no order authorizing in general terms the appointment of aids to the Admiral of the Navy.'

" Section 1556 of the Revised Statutes as amended by the act of March 3, 1899 (30 Stat. 1024):

" ' For the pay and allowances prescribed by law of officers * * *, including the Admiral of the Navy, whose pay and allowances shall be the same as those received by the last General of the United States Army. * * *.'

" By section 630 of the United States Navy Regulations of 1870 the Admiral of the Navy is classed as a ' line officer.'

" Paragraph 16, page 35, United States Navy Regulations of 1876:

" ' All officers attached to the personal staff of the Commander in Chief are under the immediate direction of the Chief of Staff; they will act as aids to the Commander in Chief at such time as he may require and he can assign them the duty of secretaries.'

" Paragraph 7, page 2, United States Navy Regulations of 1876:

" ' A lieutenant-commander may act as aid to an admiral, * * *.'

" Paragraph 38, page 14, United States Navy Regulations of 1893:

" ' A lieutenant of the junior grade may serve * * * as aid to an officer of flag rank, * * *.'

" Paragraph 342, United States Navy Regulations of 1893:

" ' The chief of staff, flag lieutenant, secretary, and aids shall constitute the personal staff of a flag officer.'

" Paragraph 344, as amended by circular No. 15, of June 3, 1895:

"'He may also, when necessary, select other line officers, junior to the flag lieutenant, to service on his personal staff as aids, but shall not assign naval cadets to such duty.'

"Paragraph 343, United States Navy Regulations of 1900, page 76:

"'The chief of staff, flag lieutenant, clerk, and aids shall constitute the personal staff of a flag officer;' and paragraph 345-(2):

"'He may also, when necessary, select other line officers, junior to the flag lieutenant, to serve on his personal staff as aids, but shall not assign naval cadets to such duty.'

"Paragraph 363, United States Navy Regulations of 1900:

(1) "'An admiral, when ordered to command afloat, may, at his discretion, nominate to the Secretary of the Navy two line officers, not above the rank of lieutenant, to serve on his staff as flag lieutenant and secretary, respectively.

(2) "'He may also, when necessary, select other line officers to serve as aids, but shall not assign a naval cadet to such duty.'

"I find no regulations authorizing aids to the Admiral except when afloat.

[Here follow certain computations of Lieutenant Caldwell's pay, not here material.]

"Paragraph 24, page 23, United States Navy regulations of 1900:

"'The relative rank between officers of the Navy, whether on active or retired list, and officers of the Army * * * shall be as follows, lineal rank only being considered:

(A) "'Admiral shall rank with general.'

"Under paragraph 31 of the Navy Regulations of 1900,

'Officers of the Navy shall perform such duty as may be assigned to them by the Navy Department;' and paragraph 32, 'The Admiral may command a fleet or perform such other duty as may be assigned to him by the Navy Department.'

"Prior to the act of March 3, 1899, known as the personnel act, officers serving as aids to an admiral were not entitled to additional pay while so serving. The regulations provide that the Admiral of the Navy shall rank with the General of the Army.

"The claimant, as lieutenant of the junior grade in the Navy, corresponds in rank with a first lieutenant in the Army. By section 1096 of the Revised Statutes it is provided that the General of the Army may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry.

"By section 1261 of the Revised Statutes the pay of a colonel in the Army is $3,500, and by section 1262 he is entitled to 10 per centum of his current yearly pay for each prior term of five years' service."

Reasoning and Conclusion of Auditor.

"An aid to the Admiral renders services similar to those rendered to the General of the Army, and it would seem that if aids are necessary for the General of the Army in the performance of his official duties, they are equally necessary to the Admiral of the Navy in the performance of his official duties at sea and on shore.

"When the act of March 3, 1899, was passed, Congress knew that the law authorized aids to the General of the Army on duty in Washington, and it would seem that it intended that the Admiral of the Navy should also be allowed aids on the same conditions. Following the rule laid down by the Supreme Court in the case of *United*

States v. *Walter S. Crosley*, 196 U. S. 327, I am of opinion, and so decide, that the claimant, while serving as aid on the staff of the Admiral of the Navy, is entitled to the pay of a colonel in the Army, $3,500, plus 10 per cent for length of service during the period he was at sea; that under the first proviso of section 13 of the act of March 3, 1899, he is entitled, while so serving, to 15 per cent less pay when on shore duty."

Decision of Comptroller of the Treasury.

(11 Comptroller's Decisions, 737–741.)

Statutes and Decisions Reviewed.

"The Revised Statutes provide:

"Section 1096—

"'The General may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry.'

"Section 1098—

"'Each major-general shall have three aids, who may be selected by him from captains or lieutenants of the Army, * * * .'

"Section 1261—

"'The officers of the Army shall be entitled to the pay herein stated after their respective designations: * * * Colonel, three thousand five hundred dollars a year. * * * First lieutenant, mounted, sixteen hundred dollars a year. First lieutenant, not mounted, fifteen hundred dollars a year. * * * Aid to major-general, two hundred dollars a year, in addition to pay of his rank. * * *.'

"Section 1262—

"'There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of the current yearly pay for each term of five years of service.'

"Section 1263—

"'The total amount of such increase for length of service shall in no case exceed forty per centum of the yearly pay of the grade as provided by law.'

"Section 13 of the act of March 3, 1899 (30 Stat. 1004), commonly known as the navy personnel act, provides:

"'That after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army. * * *.'

"The claimant as lieutenant of the junior grade in the Navy corresponds in rank with a first lieutenant in the Army. (Revised Statutes, section 1466.)

"By section 1098, Revised Statutes, *supra*, it is provided that each major-general shall have three aids, who may be chosen by him from captains or lieutenants of the Army, and each aid so chosen is entitled by section 1261, Revised Statutes, *supra*, to $200 a year in addition to the pay of his rank.

"In the case of *United States* v. *Crosley*, 196 U. S. 327, cited by the Auditor, it was held that a lieutenant in the Navy serving as aid to a rear-admiral, the rear-admiral under section 1466, Revised Statutes, corresponding in rank with a major-general in the Army, is entitled to the $200 allowed to lieutenant serving as aid to a major-general under section 1261, Revised Statutes. In that case it was said:

"'The contention of the government is that, while the pay of naval officers is made to correspond with that of army officers of like rank, the naval officer assigned to duty as aid may not receive the $200 additional pay, as it is not pay on account of rank, but on account of service. But we think this is too narrow a construction of the terms of the act, in view of its intent and purpose. For while we may not add to or take from the terms of a statute, the main purpose of construction is to give effect to the legislative intent as expressed in the act under consideration. An aid to a rear-admiral renders services similar to those rendered by an aid to a major-general in the Army. The naval aids are appointed under paragraphs 343 and 345, of the Naval Regulations of 1895, which are:

"'Sec. 343. The chief of staff, flag lieutenant, clerk, and aids, shall constitute the personal staff of a flag officer.'

"'Sec. 345. (1) A flag officer may select any officer of his command to serve as flag lieutenant or clerk, provided his grade accords with the rules laid down in article 344. (2) He may also, when necessary, select other line officers junior to the flag lieutenant to serve on his personal staff as aids, but shall not assign naval cadets to such duty.'

"'They are selected for like service, and it is admitted that there would have been reason for a like express statutory provision in their favor as to compensation. The sum of $200 is allowed to an aid to a major-general in addition to the regular pay of his rank. It is allowed as payment for the additional service imposed. Bearing in mind the purpose of the act to give the same compensation to corresponding officers of the Army and Navy, and that it is expressly provided that officers of the Navy shall receive the same pay and allowances, except for forage, as are or may be provided by law for officers of the Army of corresponding rank, we think it does no violence to, but rather carries out, the purpose of Congress to construe this section so as to give to an aid of a rear-admiral, in addition to the regular pay of his rank, pay similar to that allowed an aid to a major-general. We

reach the conclusion that the Court of Claims was right in its allowance of this item.'

" In this case the claimant as lieutenant of the junior grade in the Navy corresponded in rank with a first lieutenant in the Army. His claim is for pay as captain in the Navy, whose relative rank is that of colonel in the Army (sec. 1466, Rev. Stat.), while serving as aid to the Admiral, under the orders quoted by the Auditor, less pay of his regular rank during said period which he has already received."

Reasoning and Conclusion of Comptroller.

" I do not think the *Crosley* case is decisive of the question here presented. In that case the claimant, being a lieutenant of the junior grade in the Navy, corresponding in rank with a first lieutenant in the Army, while serving as aid to a rear-admiral in the Navy, corresponding in rank with a major-general in the Army, was allowed the extra $200, the same as a lieutenant in the Army would be entitled to receive while serving as aid to a major-general. In other words, it was decided in that case that the extra $200 allowed to a first lieutenant in the Army, in addition to the regular pay of his rank while serving as aid to a major-general, was because of additional service imposed upon the officer; in other words, the pay of a first lieutenant of the Army, when serving as aid to a major-general, is $200 more than his pay when not so serving, but the extra $200 allowed to him when serving as aid is pay of the office; that Crosley, being a lieutenant of the junior grade in the Navy, held an office corresponding in rank to that of a first lieutenant in the Army, and being an aid to a rear-admiral, corresponding in rank to a major-general, he was entitled by section 13 of the navy personnel act to the same pay as an officer of correspond-

ing rank in the Army, including $200 in addition to the pay of his rank because of additional service imposed upon him while serving as aid to a rear-admiral, being the same pay a first lieutenant is entitled to receive when serving as aid to a major-general. In either case the extra $200 is a part of the pay of the office, being $200 more when the officer is serving as aid than when he is not so serving, the extra $200 being allowed because of additional service imposed upon the officer.

"By section 1096, *supra*, a lieutenant or captain selected as aid by the General of the Army has conferred upon him by said section, while serving as such aid, the rank of colonel of cavalry, and by section 1261, *supra*, he is entitled to the pay of a colonel.

"In 16 Op. Att. Gen. 551, it was held that the rank conferred by section 1096, Revised Statutes, upon the aids selected by the General of the Army thereunder, entitled such aids to the precedence, when serving upon courts-martial, courts of inquiry, military boards, and the like, to which the same rank would entitle an officer of the line or staff (independent of office of aid) when thus serving.

"The pay to an aid to the General of the Army is pay based solely on rank. For pay purposes he is a colonel, the same as if he had been appointed as such by the President and confirmed by the Senate, although the office he holds may be only that of a first lieutenant. (*Wood* v. *United States*, 15 C. Cls. 151.) I know of no statute or regulation which confers upon the claimant in the case here presented, while serving as aid to the Admiral, any different rank from that which he held while not serving as such aid. To hold that he is entitled while serving as aid to the Admiral to the pay of a captain in the Navy whose relative rank is that of colonel in the Army, would be to assume that while serving as such aid his rank was

changed from that of lieutenant, junior grade, to that of captain in the Navy, and this in the absence of any statute or regulation conferring upon him such higher rank, which would be a liberty I do not feel justified in assuming. The office and rank which he held while serving as aid to the Admiral was that of lieutenant, junior grade, in the Navy, corresponding in rank to a first lieutenant in the Army, and I know of no statute or regulation by which he can be allowed any pay in addition to the pay of the office and rank which he held.

"The decision by the Auditor is not approved."

Decisions of this Court.

In addition to *United States* v. *Crosley*, 196 U. S. 327, which the Auditor treated as decisive of this case in favor of the officer is *United States* v. *Miller*, 208 U. S. 32, which still more closely approaches in principle the question here involved. In both the *Crosley* and *Miller* cases the claim was for additional pay as aid to a *rear*-admiral. The case was decided in favor of the officer on the ground that an aid to a rear-admiral performs duties analogous to those of an aid to a major-general in the Army with whom a rear-admiral in the Navy corresponds in rank. He is therefore entitled by virtue of the clauses assimilating the pay of officers of the Navy to that of officers of the Army to receive the pay allowed by Army statutes to an aid to a major-general.

The *Miller* case differed from the *Crosley* case in that Miller was designated not as aid to the rear-admiral, but as flag lieutenant. As it appeared, however, that a flag lieutenant performed duties analogous in substance to those performed by an aid to a major-general, it was held that he was entitled to pay as an aid. The court said, in the opinion by Mr. Justice Day (208 U. S. 35):

"But we think it would be giving a too narrow interpretation of the purpose of Congress to give naval officers the same pay as officers of corresponding rank in the Army to construe this regulation to deny such pay to a flag lieutenant because he may not have been technically designated as an aid. And taking the regulation literally, it does not necessarily follow that because the rear admiral may select a junior to the flag lieutenant to serve on his personal staff as aid, that the one designated as flag lieutenant or clerk might not also be regarded as an aid. Be this as it may, we think the statute should be construed so as to effect the purpose of Congress, and that a determination of who are aids should be arrived at by a consideration of the nature and character of the duties of the officers constituting the personal staff of a flag officer."

The Distinction Purely Formal.

The only distinction between the case of an aid to a rear-admiral and that of an aid to the Admiral is this: The pay of an aid to a major-general in the Army corresponding to a rear-admiral in the Navy is fixed by adding a certain named sum to the pay of the officer. The pay of an aid to the General of the Army corresponding to the Admiral of the Navy is fixed by reference to that of a rank in the Army higher than that of the office actually held by the officer so serving. The distinction is one purely of form.

Anomalous Result of Comptroller's Decision.

It would be a singular anomaly if the aids to the next to the highest officer in the Navy should be entitled to additional compensation for their performance of that duty, while the aid to the highest officer of all should have no additional compensation whatever for the performance of that duty. The reasons which may be supposed to have actuated Congress in allowing extra compensation to aids to a major-general, and therefore by

analogy to the aids to the rear-admiral, are fully shown by the findings of fact in the *Miller* case. Every reason there given applies with increased force to the still higher duty of an aid to the Admiral of the Navy.

In *United States* v. *Farenholt*, 206 U. S. 226, this Court has said (per Mr. Justice McKenna) in words which apply precisely to the present case (pp. 229, 230):

"In other words, the Government contends it was the purpose of Congress to give the inferior officer the better pay. The Assistant Attorney-General ventures on no explanation of this anomaly, but insists upon the written word. A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And 'construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.' Lieber, 56. The application of this rule is clear."

These words apply exactly here. The law allows special compensation to aids to major-generals in the Army. That compensation is held to be earned by aids to rear-admirals in the Navy. It also allows special compensation to aids to the General of the Army. *A fortiori* is that compensation also allowable to aids of the corresponding officer of the Navy, the Admiral.

The only difference between the two is in the form in which the compensation is allowed. In one instance, it is by way of a special sum as additional compensation; in the other, by allowing the pay of a higher rank than that of the office actually held by the officer. There is no reason for making a discrimination against aids to the admiral merely because their compensation is fixed in a different form.

Conclusion.

The Admiral of the Navy ranks with the General of the Army. The aid to the Admiral of the Navy corresponds precisely to the aid to the General of the Army. All provisions of law which in any way affect the office of general apply with all their incidents as to pay, etc. to that of Admiral of the Navy (act of March 2, 1899, 30 Stat. L. 995; act of March 3, 1899, 30 Stat. L. 1024, 1025, 1045).

The general rule prescribed by Congress is a correspondence of pay between the officers of the Army and of the Navy. The application of that rule clearly entitles the claimant in this case to the pay of a captain in the Navy, corresponding to colonel in the Army, in accordance with the general rule prescribed by Congress for the compensation of officers of the Navy.

It is therefore submitted that the judgment of the Court of Claims should be reversed and the cause remanded with directions to enter judgment for the appellant for the amount shown due by Finding II, $3,560.33.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellant.

9

Office Supreme Court, U. S.
FILED.
FEB 15 1912
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 71.

SPENCER S. WOOD, Appellant,

v.

THE UNITED STATES.

Appeal from the Court of Claims.

Supplemental Brief for Appellant.

(In Compliance with Order of January 31, 1912.)

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellant.

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Supreme Court of the United States.

October Term, 1911.

SPENCER S. WOOD, *Appellant*,
v.
THE UNITED STATES. } No. 71.

SUPPLEMENTAL BRIEF FOR APPELLANT.

[In compliance with order of January 31, 1912.]

Questions Propounded.

The questions propounded by the court to counsel are as follows:

"Did sec. 1096 of the Revised Statutes cease to be operative when the office of General of the Army became extinct? In other words, were not the provisions of that section repealed by force of the proviso at the end of section 1094, Rev. Stat.?

"If repealed, what provision if any is relied upon as the basis for applying the terms of section 1096 to the claim made in this case?"

Statutes Involved.

The sections of the Revised Statutes referred to in these questions with others in immediate sequence thereto, are as follows:

"SEC. 1094. The Army of the United States shall consist of—

"One General.

"One Lieutenant-General. * * *

"*Provided*, That when a vacancy occurs in the office of General or Lieutenant-General such office shall cease, and all enactments creating or regulating such offices shall, respectively, be held to be repealed.

"Sec. 1095. The General shall have the title of General of the Army of the United States.

"Sec. 1096. The General may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry.

"Sec. 1097. The Lieutenant-General may select from the Army two aids and one military secretary, who shall have the rank of lieutenant-colonel of cavalry while serving on his staff.

"Sec. 1098. Each major-general shall have three aids, who may be selected by him from captains or lieutenants of the Army, and each brigadier-general shall have two aids, who may be selected by him from lieutenants of the Army."

A subsequent statute with relation to the office of general is as follows (25 Stat. L. 165):

"Chap. 338.—An act to revive the grade of General in the United States Army.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the grade of Lieutenant-General of the Army is hereby discontinued and is merged in the grade of General of the Army of the United States, which grade shall continue during the lifetime of the present Lieutenant-General of the Army, after which such grade shall also cease; and the President of the United States is hereby authorized to appoint, with the advice and consent of the Senate, a General of the Army of the United States.

"Sec. 2. That the pay and allowances of the General be the same as heretofore allowed for that grade.

"Approved, June 1, 1888."

We add a similar statute relating to the grade of Lieutenant-General (28 Stat. L. 968):

"(No. 9.) Joint Resolution To revive the grade of lieutenant-general in the United States Army.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the grade of lieutenant-general be, and the same is hereby, revived in the Army of the United States, in order that when, in the opinion of the President and Senate, it shall be deemed proper to acknowledge distinguished services of a major-general of the Army, the grade of lieutenant-general may be specially conferred: *Provided, however*, That when the said grade of lieutenant-general shall have once been filled and become vacant, this joint resolution shall thereafter expire and be of no effect.

"Sec. 2. That the pay and allowances of the lieutenant-general be the same as heretofore allowed for that grade.

"Approved, February 5, 1895."

It will be convenient to add in immediate sequence the text of the acts relating to the office of Admiral of the Navy (30 Stat. L. 995):

"Chap. 378.—An Act creating the office of Admiral of the Navy.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President is hereby authorized to appoint, by selection and promotion, an Admiral of the Navy, who shall not be placed upon the retired list except upon his own application; and whenever such office shall be vacated by death or otherwise the office shall cease to exist.

"Approved, March 2, 1899."

The identical provision is repeated, word for word, at the close of the Naval Appropriation Act of March 3, 1899 (30 Stat. L. 1045). The same appropriation act contains near the beginning thereof (30 Stat. L. 1024, 1025):

"For the pay and allowances prescribed by law of

officers * * * including the admiral of the Navy, whose pay and allowances shall be the same as those received by the last General of the United States Army," etc.

Office of General in Abeyance.

The first question is—

"Did sec. 1096 of the Revised Statutes cease to be operative when the office of General of the Army became extinct?

"In other words, were not the provisions of that section repealed by force of the proviso at the end of Sec. 1094, Rev. Stat.?"

This question we submit should be answered as follows:

1. Sec. 1096 of the Revised Statutes was revived by force of the Act of June 1, 1888 (*ante*, p. 2).

2. As the Act of 1888 provides merely for the cessation of the grade after the lifetime of the appointee under the Act and not for the repeal of the statute creating the office, the statute itself was not repealed, though there was no present holder of the office to whom it could apply.

There is a distinction between the repeal of a statute creating an office, and the cessation of a grade by the occurrence of a contingency upon which the office becomes vacant.

Sec. 1094 of the Revised Statutes begins with the words "The Army of the United States shall consist of —One General." The concluding proviso is "That when a vacancy occurs in the office of General or Lieutenant-General such offices shall cease, and all enactments creating or regulating such offices shall, respectively, be held to be repealed."

Sec. 1095 defines the title of the General. Sec. 1096 makes provision for his staff.

Under the terms of the proviso to this section which declares not only that the office of general shall cease upon the occurrence of a vacancy, but that all enactments relating thereto shall in that event be held to be repealed, it may be that not only would the office itself come to an end, but the statutes themselves be repealed. Even in that event it is submitted that all provisions touching the office and staff of the General were revived in their application to the office and staff of Admiral of the Navy by the legislation of 1899, reviving that office.

The Act of 1888, however, makes a materially different provision with regard to the office of General. It revives the grade of General of the Army of the United States "which grade shall continue during the lifetime of the present Lieutenant-General of the Army, after which such grade shall also cease." It also provides in its second section "that the pay and allowances of the General be the same as heretofore allowed for that grade." This Act revived and re-established the grade of General of the Army of the United States, and by reference to previous legislation fixed the pay of the office. It contains no provision which amounts to a repeal of the legislation touching the office in any contingency. It provides that upon the occurrence of a certain event, to wit, the death of the then Lieutenant-General, who was to be appointed to the revived office of General, the grade of General shall cease.

The contemporaneous construction of this act by the War Department on this question of aids is very significant. The act (*ante*, p. 2) says not a word about aids. There had been no such aids since the retirement of the last General of the Army, William T. Sherman, on February 8, 1884. Sec. 1096 (*ante*, p. 2) had gone into abeyance, if it had not been actually repealed by the proviso to Sec. 1094. Yet, upon the revival of the grade of

General, Sec. 1096 was treated as also revived. The very day of the passage of the act of 1888 reviving the grade of General, the following General Orders were issued:

"HEADQUARTERS OF THE ARMY,
"ADJUTANT-GENERAL'S OFFICE,
"WASHINGTON, *June 1, 1888.*

"General Orders, }
"No. 37. }

"I. The following-named officers are appointed aides-de-camp on the staff of the General of the Army, with rank of colonel, to date from this day:

"Major Michael V. Sheridan, assistant adjutant-general.

"Captain Sanford C. Kellogg, 5th Cavalry.

"Captain Stanhope E. Blunt, Ordnance Department.

"II. In addition to his duties as aide-de-camp, Colonel Blunt will continue to perform the duty of inspector of rifle practice at Headquarters of the Army.

"By command of General Sheridan.

"R. C. DRUM,
"*Adjutant General.*"

These orders will be found in the bound General Orders for 1888 in the Library of the War Department, and were also at the time published in full in the Army and Navy Journal for June 9, 1888, Vol. 25, p. 914.

These officers received their rank of colonel solely by force of Sec. 1096 of the Revised Statutes, which had gone out of effect four years before upon the retirement of General Sherman, but whose operation was held to be revived upon the revival of the grade of General. These officers were, of course, paid as colonels during their service on the staff of the General, pay in the Army being wholly dependent upon rank.

This is explained and these very instances of aids to the General and Lieutenant-General referred to in the opinion of the Court of Claims in *Wood* v. *United States*, 15 C. Cls. 151, 159, 160 (affirmed 107 U. S. 414):

"In some cases officers of the line have a rank assigned to them different from that of the title of their office. The Revised Statutes, in section 1096, provide that the General may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry. By section 1097, the Lieutenant-General may select from the Army two aids and one military secretary, who shall have the rank of lieutenant-colonel of cavalry while serving on his staff. These selections may be, and usually are, made from among officers whose rank is raised to a higher degree by the service assigned to them. A captain of infantry in the line of the Army may thus be made to rank, temporarily, as a colonel of cavalry. That the new rank thus conferred is not a new office is conclusively shown by the fact that it is acquired by a selection or appointment, if it may be so called, made by the General of the Army, and the Constitution does not permit the power of appointment to office to be vested in the General of the Army. (*United States* v. *Germaine*, 99 U. S. 503; *Collins' Case*, 14 C. Cls. R. 568, and *ante*, 22.)

"The pay of officers on the retired list of the Army is determined by the rank upon which they are retired (Rev. Stat., Sec. 1274), and all officers, whether on the active or retired list, are paid according to their rank, except in the case of chaplains, who, under the designation or title of their office, are paid a lower rate than is allowed to other officers of the same rank. (Rev. Stat., Sec. 1261)."

General Philip H. Sheridan, the person designated in the statute, died August 5, 1888.

His aids thereupon reverted to their lineal rank of Major and Captain, respectively (Army Register 1889, Major Sheridan, p. 8; Captain Kellogg, p. 69; Captain Blunt, p. 47), losing, of course, the increase of pay which they had enjoyed during their temporarily higher rank while serving on the staff of the General.

Suppose General Sheridan had lived eleven years

longer, or until the date of the statutes of 1899 reviving the grade of Admiral of the Navy, fixing the pay of that office, and providing that all officers of the line of the Navy should receive the same pay and allowances as officers of corresponding rank in the Army. In that event, all the provisions of statutes then in existence touching the pay and allowances of aids to the General of the Army would have taken full force and effect in favor of the aids to the Admiral of the Navy by analogy to the pay and allowances then in full force and effect of the aids to the General of the Army.

If, after they had thus taken effect, General Sheridan, had died, and thereby the grade of General had ceased, it would hardly be contended that the death of the General of the Army, and the consequent abolition of his staff, would have had the effect to change the pay of the aids to the Admiral of the Navy. What difference does it make in legal effect that the last General of the Army happened to die before the passage of the Acts of 1899?

Office of Lieutenant-General.

A similar instance of statutory provisions which had gone out of all practical operation, and were in terms even repealed, being revived in practical operation by the re-establishment of a grade, is afforded by the office of Lieutenant-General of the Army. That grade was, by the proviso to Sec. 1094 of the Revised Statutes (*ante*, p. 2), to cease upon the occurrence of a vacancy; and all enactments creating or regulating the office were thereupon to be held to be repealed. Among the provisions of the Revised Statutes relative to the office was Sec. 1097 (*ante*, p. 2), giving the Lieutenant-General two aids and one military secretary, all to have the rank of Lieutenant-Colonel of Cavalry while serving on his staff.

Lieutenant-General Sheridan was promoted to be Gen-

eral by force of the Act of 1888 which we have just been discussing. The grade was thus vacated, and, according to the proviso to Sec. 1094, all enactments creating or regulating it were to be held to be repealed. It so remained until February 5, 1895, when it was revived by joint resolution to revive the grade of Lieutenant-General in the United States Army (*ante*, p. 3). The grade was revived by this joint resolution with the pay and allowances heretofore allowed for that grade. Nothing was said about a staff. Immediately upon the passage of the joint resolution, Major-General John M. Schofield was appointed to the revived grade of Lieutenant-General. Immediately upon his appointment, the following General Orders were issued:

"Headquarters of the Army,
"Adjutant General's Office,
"WASHINGTON, *Feb. 8, 1895.*

"General Orders,
No. 8.

"I. The following-named officers are appointed aides-de-camp on the staff of the Lieutenant-General of the Army, with rank of lieutenant-colonel, to date from this day:

"Captain Charles B. Schofield, 2d Cavalry,

"Captain Tasker H. Bliss, Subsistence Department.

"II. In addition to his duties as aide-de-camp, Lieutenant-Colonel Bliss will continue to perform the duties of inspector of artillery and small-arms practice at Headquarters of the Army.

"By command of Lieutenant-General Schofield:

"GEO. D. RUGGLES,
"*Adjutant-General.*"

"Headquarters of the Army,
"Adjutant General's Office,
WASHINGTON, *February 11, 1895.*

"General Orders,
No. 9.

"Lieutenant-Colonel William M. Wherry, 2d Infantry,

is appointed Military Secretary on the staff of the Lieutenant-General of the Army, to date from this day.

"By command of Lieutenant-General Schofield:

"GEO. D. RUGGLES,
"*Adjutant-General.*"

These orders will be found in the bound General Orders for 1895 in the Library of the War Department, and were also at the time published in full in the Army and Navy Journal for February 16, 1895, Vol. 32, p. 406. Further General Orders, No. 28, of May 1, 1895, are as follows:

"Headquarters of the Army,
"Adjutant-General's Office,
"WASHINGTON, *May 1, 1895.*

"General Orders, }
No. 28. }

"I. The resignation by Lieutenant-Colonel William M. Wherry, 2d Infantry, of his appointment as Military Secretary on the staff of the Lieutenant-General is hereby accepted, to take effect this day.

"II. With the approval of the Secretary of War, Major Joseph P. Sanger, Inspector-General, is hereby appointed Military Secretary, with the rank of Lieutenant-Colonel, on the staff of the Lieutenant-General of the Army, to take effect this day."

This order will also be found in the bound General Orders of 1895, and was likewise published in full in the Army and Navy Journal for May 4, 1895, Vol. 32, p. 590. These officers (with the exception of Wherry who was already a Lieutenant-Colonel) received their rank of Lieutenant-Colonel solely by force of Sec. 1097 of the Revised Statutes which had gone out of effect seven years before upon the discontinuance of the grade of Lieutenant-General, but whose operation was held to be revived with the revival of the grade of Lieutenant-General. These

officers were, of course, paid as Lieutenant-Colonels during their service on the staff of the Lieutenant-General, pay in the Army being wholly dependent upon rank (*ante*, pp. 6, 7).

Lieutenant-General Schofield remained on the active list in that grade less than 8 months, being retired for age September 29, 1895 (Army Register 1896, p. 211). His aids and military secretary thereupon reverted to their lineal rank of captain and major respectively (Army Register 1896, Captain Schofield, p. 54; Captain Bliss, p. 19; Major Sanger, p. 9); losing, of course, the increase of pay which they had enjoyed during their temporarily higher rank while serving on the staff of the Lieutenant-General.

Offices in Abeyance.

Attorney-General Cushing, in 7 Opinions, 399, draws the distinction between the repeal of a statute establishing a grade or office, and the vacating of an office by the occurrence of some contingency provided for in the statute which creates a permanent vacancy in the office and puts it in abeyance. He says (pp. 413, 414):

"Does there exist now any provision of law fixing the rate of pay for that office?

"It is admitted that, if there be any, it is in the 5th section of the act of 1798, already cited, which did fix the rate of pay of the office when it was originally created. And the critical inquiry is, whether that provision has been repealed, and so is dead, and to be revived only by positive enactment; or whether it be dormant only, or in abeyance, and so resumes activity and legal effect whenever occasion for its employment arises. It may be one effect, it may be the other; either is a common occurrence of the statutes."

And (p. 429):

"Sometimes it has expressly abolished a military office, leaving the pay untouched, and has afterwards revived

the office to receive, by construction, the old pay. Sometimes, in reviving the office, it has modified the law of pay, leaving the old law to attach in part. Sometimes, in abolishing the office, it has repealed the statute of appointment, and also the statute of pay, and in restoring the office has re-enacted the pay. And thus it is, that to determine any such question, we have to compare and construe all the acts in *pari materia*, from the foundation of the Government."

The distinction is thus clearly made between the repeal of a statute creating an office, and the cessation of the existence of the office by the occurrence of a contingency, as by the death of its only possible holder.

Revised Statutes, §§ 1094, 1096, in Force.

Of which class are the statutes creating and bringing to an end the office of General of the Army?

The proviso at the end of Sec. 1094, Revised Statutes, not only provides for the cessation of the office of General, but upon the occurrence of that event for the repeal of the statutes creating or regulating the office.

The Act of 1888, however (*ante*, p. 2), revived the office, but provided that after the lifetime of the first holder thereof "such grade shall also cease." There is no provision in that Act or in any subsequent act repealing it. Upon the face of the statute, there is nothing to prevent the existence of the office at this day. It is only by reference to the Army Register or other historical data that we know that the office is no longer held by the person for whom it was revived. The statute itself remains in force, but without any person being now in existence to whom it can apply.

Recognition in Army Regulations.

This is the view authoritatively taken in the Army Regulations promulgated by direction of the President.

Every edition of those regulations beginning with 1895, and continuing to the current edition, contains the following paragraph:

"12. The relative rank between officers of the Army and Navy is as follows, lineal rank only being considered:

"General with Admiral. * * *" (Editions of 1895, 1901, 1904, 1905, 1908 and 1910.)

Recognition in Navy Regulations.

So, too, every edition of the Navy Regulations issued since the office of Admiral was revived in 1899, including the one now in force, contains the following provision:

"The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army and of the Marine Corps, shall be as follows, lineal rank only being considered: (*a*) Admiral shall rank with General. * * *" (Editions of 1900, art. 24; 1905, art. 24; 1909, art. 25.)

Authority of Regulations.

This construction of the statutes by the Army and Navy Regulations is in the highest degree authoritative. As to effect of Army Regulations, see *United States* v. *Eliason*, 16 Peters, 291, 302. As to Navy Regulations, see *Smith* v. *Whitney*, 116 U. S. 167, 180, 181.

The most thorough and complete discussion as to the authority of regulations is probably the "Remarks on the Army Regulations and Executive Regulations in General, by G. Norman Lieber, Judge-Advocate-General, U. S. Army, 1898," published separately, and also as Appendix A to the Digest of Opinions of the Judge-Advocate-General of the Army, revised edition, 1901 (pp. 703–758).

The authority of regulations as a source of governmental liability is recognized in the act creating the

Court of Claims and its re-enactments. Since the original creation of that court by the Act of February 24, 1855, it has always been invested, among other things, with jurisdiction to "hear and determine all claims founded upon any law of Congress or upon any regulation of an executive department," etc., Act of February 24, 1855, Sec. 1 (10 Stat. L. 612); Act of March 3, 1887, Tucker Act, Sec. 1, Par. 1st (24 Stat. L. 505); Act of March 3, 1911, Judicial Code, Sec. 145, Par. 1st (36 Stat. L. 1136).

The passages cited from both the Army and the Navy Regulations show that, although there is now no person in existence capable of holding the office of General of the Army, the statute creating that office is not treated as repealed. On the contrary, the Regulations of both services treat it as in force for the purpose of fixing the relative rank of the Admiral of the Navy with reference to the officers of the Army.

§§1094, 1096 Revived by Acts 1888 and 1889.

The second question is:

"If repealed, what provision if any is relied upon as the basis for applying the terms of section 1096 to the claim made in this case?"

We answer:

1. The act of 1888 (*ante*, p. 2), reviving the grade of General in the Army, and providing that upon the death of the holder the grade shall cease,—not that the statutes creating it shall be repealed.

2. The act of 1899 (*ante*, p. 3), creating the office of Admiral in the Navy, together with the provisions of both Army and Navy Regulations (*ante*, pp. 12, 13), assimilating it to that of General of the Army.

Sec. 1096 provides:

"The General may select from the Army such num-

ber of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry."

This section is taken from Sec. 2 of an earlier act of the same title as the one of 1888 which we have relied upon "An act to revive the grade of General of the United States Army," approved July 25, 1866, 14 Stat. L. 223. Sec. 2 of that act reads in part as follows:

"And the said general may select from the regular army for service upon his staff such number of aides, not exceeding six, as he may judge proper, who during the term of such staff service shall each have the rank, pay, and emoluments of a colonel of cavalry."

This provision is carried into the Revised Statutes.

Sec. 1096 provides for the rank of colonel of cavalry for these officers, while their pay is provided for by the general provisions of sections 1261, 1262, 1263 and 1267, relative to pay.

Even if the concluding proviso of Sec. 1094 of the Revised Statutes had the effect of repealing all laws creating or regulating the office of General of the Army, those laws were revived by the Act of June 1, 1888, with all their incidents.

When, by the legislation of 1899 (*ante*, p. 3), the grade of Admiral of the Navy was revived, his pay was fixed by reference to that of the last General of the Army. The regulations of both Navy and Army, as we have seen (*ante*, p. 13), provide that the Admiral of the Navy shall have relative rank with the General of the Army. True, there was not in 1899, nor has been since any existing General of the Army, and therefore no aids to the General. Yet the provisions relating to the General were revived by the Act of 1888, and must be

regarded as continuing in force for any purpose to which they may be applicable.

Sec. 1096, so far as it has the effect to fix the pay of the General's aids by reference to a rank higher than that lineally held by them must necessarily be regarded as one of the statutes revived by force of the Act of 1888. While that Act, as well as the sections of the Revised Statutes which were revived by its passage, was necessarily left without anything to operate upon by the death of the last General of the Army, there was nothing to prevent them taking effect upon the creation of the office of Admiral of the Navy who corresponded in rank and pay to the last General of the Army.

Full effect, indeed, can not be given either to the acts reviving the grade of Admiral of the Navy with the rank and pay of General of the Army, or to the terms of the Personnel Act giving officers of the line of the Navy the same pay as the officers of corresponding rank in the Army, without conceding to the members of the Admiral's staff the same pay which was allowed by law to the aids to the last General of the Army.

Analogy of Admiral's Secretary.

There is one officer who not only draws his pay, but holds his position, solely by virtue of provisions of the Revised Statutes which remained in abeyance for eight years, and then were not re-enacted. The Revised Statutes, Title XV, The Navy, contains the following provisions:

"SEC. 1362. The active list of the line officers of the Navy of the United States shall be divided into eleven grades, as follows, namely:

"First. Admiral.

"Second. Vice-Admiral. * * * *

"*Provided*, That vacancies occurring in the grades of Admiral and Vice-Admiral shall not be filled by promo-

tion, or in any other manner; and that when the offices of said grades shall become vacant, the grade itself shall cease to exist."

"SEC. 1367. The Admiral and Vice-Admiral shall each be allowed a secretary, who shall be entitled to the rank and allowances of a lieutenant in the Navy."

"SEC. 1556. The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the Navy, shall be entitled to receive annual pay at the rates herein stated after their respective designations:

* * * * * * *

"Secretaries to the Admiral and the Vice-Admiral, each $2500."

The grade of Admiral by virtue of the concluding proviso to section 1362 ceased to exist upon the death of Admiral David D. Porter, February 13, 1891, and that of Vice-Admiral by the death of Vice-Admiral Stephen C. Rowan, March 31, 1890.

Solicitor-General William H. Taft in 1890 advised the Secretary of the Navy, with the approval of the Attorney-General, that the Secretary to the Admiral was a purely personal appointee, not entitled to a commission from the President, and holding office only during the lifetime of the Admiral (19 Opin. of Attorney-General, 589, 590). When, therefore, Admiral Porter died in 1891, the office of Secretary to the Admiral ceased to exist with that of Admiral.

When Congress in 1899 revived the grade of Admiral of the Navy, not a word was said in the legislation about a Secretary to the Admiral. At no time since the enactment of the Revised Statutes has any new provision been made by statute for such an office.

Nevertheless, the Comptroller of the Treasury held in 1900 that upon the revival of the grade of Admiral, the position of Secretary to the Admiral also revived, and

the statutes pertaining thereto became again operative, and that both the appointment and the compensation of the Secretary must be determined by the provisions of the Revised Statutes relating thereto, although from 1891 to 1899 there was no person in existence to whom those provisions could have any application. His language is as follows (6 Comp. Dec. 828, 829):

"The grade of admiral in the Navy was established by section 1 of the act of July 25, 1866 (14 Stat., 222), but ceased to exist when said office became vacant on the death of Admiral David D. Porter, U. S. Navy, February 13, 1891, by operation of the act of January 24, 1873 (17 Stat., 418; section 1362, Revised Statutes). The grade was revived by the act of March 2, 1899 (30 Stat., 995, repeated in the Navy Appropriation Act of March 3, 1899 (30 Stat. L. 1045), as follows:

"'The President is hereby authorized to appoint, by selection and promotion, an Admiral of the Navy, who shall not be placed upon the retired list except upon his own application; and whenever such office shall be vacated by death or otherwise the office shall cease to exist.'

"The secretary to the Admiral is not a commissioned officer, but is a personal appointee of the Admiral. (19 Op. Att. Gen., 589.) The position was necessarily in abeyance until the grade of admiral was revived. I am of opinion, however, and hold that when the grade was revived the provisions of law relating to the secretary to the Admiral became again operative. Not being a commissioned officer, his pay is not affected by the navy personnel act. I have, therefore, the honor to advise you that Mr. Crawford is entitled to compensation as secretary to the Admiral at the rate of $2,500 per annum and the allowances of a lieutenant in the Navy, from the date of accepting his appointment."

The analogy to the present question is complete. The last General of the Army died in 1888. But the provisions of statute relating to him and to his staff did not go

out of existence upon his death. They merely remained in abeyance until some subject came into existence upon which they could operate. Such a subject was supplied by the legislation of 1899. This legislation provided:

1. That there shall be an "Admiral of the Navy, whose pay and allowances shall be the same as those received by the last General of the United States Army" (Acts of March 2 and 3, 1899, *ante*, pp. 2, 3).

2. That "officers of the line of the Navy" "shall receive the same pay and allowances" as "the officers of corresponding rank in the Army" (Navy Personnel Act, Sec. 13, brief for appellant, p. 2).

Reading these acts in connection with the provisions of Secs. 1094 and 1096 of the Revised Statutes (*ante*, p. 2), and the Act of June 1, 1888, to revive the grade of General of the United States Army (*ante*, p. 3), it is a necessary conclusion that just as the obsolete office of Secretary to the Admiral became again existent in 1899, when the office of Admiral was revived, so also did the aids to the Admiral when lawfully selected in pursuance of regulations from among the commissioned officers of the Navy become entitled to the pay provided by the Personnel Act, to wit, the pay of officers of corresponding rank in the Army, who had performed such service on the staff of the last General of the Army, and who would if the grade of General were to-day re-established perform similar services, and receive pay as of the grade of colonel in conformity with the provisions of Sec. 1096 of the Revised Statutes without the necessity of any new legislation for that purpose.

Purpose of the Legislation of 1899.

While this discussion may seem to rest upon a technical point, we believe that a consideration of the object

and purpose which Congress had in view in the enactment of the legislation of 1899 will lead to the same result.

The office of Admiral of the Navy was revived, and his pay was assimilated by express provision to that of the last General of the Army. The regulations, both of the Army and the Navy, promulgated since that date, have ranked this officer with the General of the Army, thus treating that grade as existing in law, though without any present holder. A consideration of the purposes of the Act of 1899, creating the office of Admiral, necessarily leads to the conclusion that Congress intended to annex to this high grade, thus revived, a like dignity to that conferred upon the last General of the Army. One of the dignities thus enjoyed by the last General of the Army was to have aids whose pay and emoluments, as well as rank, should be that of colonel of cavalry. When Congress by legislation contemporaneous with that reviving the office of Admiral of the Navy fixed the pay of line officers of the Navy at that of officers of corresponding rank in the Army, one effect was to give to the aids of Rear-Admirals the same special rate of pay as that enjoyed by aids to Major-Generals in the Army (*United States* v. *Crosley*, 196 U. S. 327). And this rule applies even where the officer is not technically designated as an aid, but performs duties analogous to those of an aid to a Major-General in the Army (*United States* v. *Miller*, 208 U. S. 32).

It only remains to apply the same rule to the aids to the Admiral of the Navy. Their duties correspond to those of aids to the General of the Army, whose special pay is given them in a somewhat different form, and by statutes whose effective operation as regards the Army ceased with the death of its last General.

We do not in this brief discuss the new provisions for the pay of the Navy made by the act of May 13, 1908, 35 Stat. L. 127, 128. It is in no way material, as the appellant's service as aid to the Admiral ended some months prior to its passage.

Respectfully submitted,

GEORGE A. KING,

WILLIAM B. KING,

Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

SPENCER S. WOOD, APPELLANT,
v.
THE UNITED STATES. } No. 71.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is the claim of an officer of the Navy, with the rank successively of lieutenant commander and commander, for the pay and allowances of a captain from October 17, 1904, to February 28, 1908, while serving as aid to the Admiral of the Navy.

The Admiral of the Navy ranks with the General of the Army. (Revised Statutes, sec. 1556, as amended by act of Mar. 3, 1899, 30 Stats., pp. 1024, 1025.)

The General of the Army is entitled to select from the Army not to exceed six aids, who shall have, while serving on his staff, the rank of colonel of cavalry. (Revised Statutes, sec. 1096.)

Captains in the Navy correspond in rank with colonels in the Army. (Revised Statutes, sec. 1466.)

Hence appellant claims in this action that having performed duties analogous to those of an aid to the

General of the Army, he is entitled by virtue of the assimilating clause of the Navy personnel act (March 3, 1899, sec. 13, 30 Stats., 1007) to the pay allowed by the Army statute to aids to a General.

The Court of Claims held that claimant was not entitled to recover and dismissed the petition.

THE STATUTES.

The act of March 3, 1899 (30 Stats., 1024):

> For the pay and allowances prescribed by law of officers * * * , including the Admiral of the Navy, whose pay and allowances shall be the same as those received by the last General of the United States Army; * * *.

Section 1096, Revised Statutes:

> The General of the Army may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry.

Section 1261, Revised Statutes, fixes the pay of a colonel at $3,500 per annum; and section 1262 declares that each commissioned officer below the rank of brigadier general shall receive * * * ten per centum of their current yearly pay for each term of five years.

Section 1267, Revised Statutes:

> In no case shall the pay of a colonel exceed four thousand five hundred dollars per year * * *.

Section 1466, Revised Statutes:

> The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army, shall be as follows, lineal rank only being considered:
>
> * * * * *
>
> Captains with colonels.
> Commanders with lieutenant colonels.
> Lieutenant commanders with majors.
>
> * * * * *

Section 13 of the Navy personnel act, March 3, 1899 (30 Stats., 1007):

> That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army: * * *

QUESTION INVOLVED.

The appellant having received during the whole of the period in controversy the full pay and allowances provided by law for an officer of his rank, namely, that successively of a lieutenant commander and commander, corresponding to that of a major and lieutenant colonel in the Army, the single question presented by this appeal is:

Whether an officer of the Navy serving as aid to the Admiral is entitled, solely by virtue of the similarity of duties performed, to the higher rank and pay provided for aids to the General of the Army, irrespective of the actual rank held by such naval officer during such period of service.

ARGUMENT.

It is well settled that the purpose of the Navy personnel act was "to equalize the pay of naval officers (theretofore generally below that paid to officers of corresponding rank in the Army) with that of officers in the Army of equal rank." (*United States* v. *Crosley*, 196 U. S., 332.) But, as declared by the Court of Claims in rejecting a claim similar in principle to the one at bar—

> It is not similar *duties* which provide the basis of pay, but it is *rank*, and an officer in the Navy seeking to enjoy the privileges conferred by the Navy personnel act must go to section 1466, R. S., and ascertain from that section what officer corresponds with himself *in rank*, and from this his pay must be determined.

Stevens v. *United States* (41 C. Cls., 461). See also *Stevens* v. *United States* (43 C. Cls., 484, 489).

There is no such rank as "aid" known to the law in either the Army or the Navy. Nor is there any provision of law either authorizing in general terms the appointment of aids to the Admiral of the Navy or providing that they shall receive higher rank or extra pay while performing such service. The appellant's regular rank, as already stated, during the period in controversy (lieutenant commander and commander) corresponded to that of major and lieutenant colonel in the Army, and he has received the full pay and allowances of such ranks.

In order, therefore, to award him the pay of the higher rank expressly provided for aids to the General of the Army it would be necessary to hold that the

order detailing appellant to duty as aid to the Admiral was self-executing and operated in and of itself to lift him out of his regular grade in the naval service, conferring upon him the increased pay and allowances of the rank of captain in the Navy corresponding to that of a colonel in the Army, and that he continued to hold such higher rank while serving as the Admiral's aid.

It may be that an aid to the Admiral performs services similar to those of an aid to a General, and while justice apparently demands that an Admiral's aid should, therefore, receive the same pay for services rendered under like official circumstances, the fact nevertheless remains that there is no provision of statute assimilating the *rank* of an aid to the Admiral to that of an aid to the General, and, therefore, no action based upon the Navy personnel act can be maintained by a naval aid for the pay and allowances of the higher rank expressly conferred upon the Army aid.

DISTINCTION BETWEEN CASE AT BAR AND FORMER DECISIONS.

Counsel for appellant contends that this claim is ruled by the decisions in *United States* v. *Crosley* (196 U. S., 327) and *United States* v. *Miller* (208 U. S., 32), which, we insist, however, are clearly distinguishable from the case at bar.

In the Crosley case the claimant was designated as aid to a rear admiral who ranked with a major general. The Army law provided that an aid to a major general should receive $200 a year *in addition to pay of his rank*, and the question was whether

having been selected for like service the naval aid was not entitled to the same additional pay as that allowed to the Army aid. The court said:

> The sum of $200 is allowed to an aid to a major general in addition to the regular pay of his rank. It is allowed as payment for the additional service imposed. Bearing in mind the purpose of the act to give the same compensation to corresponding officers of the Army and Navy, and that it is expressly provided that officers of the Navy shall receive the same pay and allowances, except for forage, as are or may be provided by law for officers of the Army of corresponding rank, we think it does no violence to, but rather carries out, the purpose of Congress to construe this section so as to give to an aid of a rear admiral, in addition to the regular pay of his rank, pay similar to that allowed an aid to a major general.
>
> *United States* v. *Crosley*, 196 U. S., pp. 333–334.

The Miller case differed from that of Crosley only in the fact that Miller was not expressly designated as an aid but was assigned as flag lieutenant on the personal staff of a rear admiral. As it appeared, however, that Miller's duties were analogous in substance to those performed by an aid, it was held that he also, and for the same reasons, was entitled to the additional compensation irrespective of whether he was technically known or designated as an aid.

In both of these cases, however, it will be recalled that the regular rank held by the plaintiffs in the

Navy was lieutenant and lieutenant, junior grade, respectively, corresponding to that of captain and lieutenant in the Army, being the grades prescribed for officers eligible for selection as aids to major generals, and that each plaintiff performed duties similar to the duties of Army aids.

It was properly held, therefore, that as there was correspondence both as to rank and duty, the assimilating clause of the personnel act applied, and Crosley and Miller were each entitled, in addition to the pay of their rank, to the extra pay of $200 per year specially provided for Army aids.

Here, however, the case is wholly different. This is not a claim for extra pay *in addition* to the pay of the regular rank held by the appellant in the Navy, but it is for the increased pay and allowances of an altogether different and higher rank, namely, that of a captain in the Navy.

DISTINCTION ONE OF SUBSTANCE.

It is no answer to assert (appellant's brief, page 13) that this distinction is purely formal. On the contrary we think it is manifestly one of material substance. In the one instance the claims were for a special sum in addition to the regular salary of the rank held by the claimants, while here the claim is for the increased pay and allowances of a wholly different and higher rank than that of the grade to which the claimant corresponded in the Army.

ALLEGED ANOMALOUS RESULT.

It is insisted that a singular anomaly must necessarily result if aids to the next highest officer in the Navy are entitled to additional compensation for the performance of their duty while the aid to the highest officer of all may receive no additional compensation whatever for the performance of that duty.

This may be true and the discrimination thus disclosed may appear harsh and unjust as applied to an Admiral's aid; but the fact nevertheless remains that the Navy personnel act, whether by oversight or otherwise, leaves an aid to the Admiral in exactly the position he occupied in years gone by before the rank of admiral was permitted to lapse, and that no provision is contained in that act for increased compensation for his services as such aid.

When the language of a statute is plain it is not the province of the court to read into it provisions it does not express.

As was well said by this court in *Thornley* v. *United States*, 113 U. S., 310, 315, in rejecting the claim of a naval officer for longevity pay after retirement, notwithstanding its allowance under a separate statute to retired officers of the Army:

> We are not called on to explain why Congress should apply one rule to the officers of the Army and another to the officers of the Navy. It is sufficient to say that it has clearly done so. If the law is unequal and unjust, the remedy is with Congress and not with the courts.

So, too, in *United States* v. *Alger*, 152 U. S. 397, where the inequality of the operation of the navy longevity pay act, as construed by this court, was again pressed upon this court, it was said:

> The duty of the courts is to apply the general rule prescribed by Congress. If injustice attends the application of the rule in particular cases, Congress alone can afford a remedy by changing the rule for the future, or granting additional compensation for the past.

It is respectfully submitted that the judgment of the Court of Claims dismissing the petition was correct and that the judgment should be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney General.
FREDERICK DE C. FAUST,
Attorney.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

SPENCER S. WOOD, APPELLANT,
v.
THE UNITED STATES.
No. 71.

APPEAL FROM THE COURT OF CLAIMS.

ADDITIONAL BRIEF FOR THE UNITED STATES.

This brief is filed in response to a notice from the clerk that the court desires additional briefs upon two questions, which we shall discuss in the order stated in the notice.

I.

"Did Sec. 1096 of the Revised Statutes Cease to be Operative When the Office of General of the Army Became Extinct? In Other Words, Were not the Provisions of that Section Repealed by Force of the Proviso at the End of Section 1094, Rev. Stat.?"

The sections referred to are as follows:

> SEC. 1094. The Army of the United States shall consist of—
>
> One general.
>
> One lieutenant general.
>
> * * * * *

Provided, That when a vacancy occurs in the office of the general or lieutenant general, such office shall cease, and all enactments creating or regulating such offices shall, respectively, be held to be repealed.

SEC. 1096. The general may select from the Army such number of aides not exceeding six as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry.

The history of the grade of General of the Army will be found concisely reviewed in a note at page 206 of the "Military Laws of the United States," fourth edition, 1901, prepared under the direction of the Secretary of War by the Judge Advocate General, United States Army, as follows:

> The grade of "General of the Armies of the United States" was created by section 9 of the act of March 3, 1799 (1 Stat. L., 752). The office, though not expressly referred to in any of the acts for the reduction or disbandment of the forces raised in contemplation of war with France, ceased to exist in 1802, not having been mentioned in the act of March 16, 1802 (2 ibid., 132), which determined the military peace establishment. The grade was revived under the title of "General of the Army of the United States," by the act of July 25, 1866 (14 ibid., 223), and was conferred upon Lieutenant General Grant; and was recognized and continued by section 9 of the act of July 28,

1866 (ibid., 333). Section 6 of the act of July 15, 1870 (16 ibid., 318), contained the requirement, however, that "the offices of general and lieutenant general shall continue until a vacancy shall exist in the same and no longer, and when such vacancy shall occur in either of said offices immediately thereupon all laws and parts of laws creating said office shall become inoperative, and shall, by virtue of this act, from thenceforward be held to be repealed." The office ceased to exist as a grade of military rank at the death of Gen. W. T. Sherman on February 14, 1891. The act of March 3, 1885 (23 ibid., 434), authorized the appointment of a "General of the Army on the retired list," which was conferred upon Gen. Ulysses S. Grant, and expired on the death of that officer on July 23, 1885. By the act of June 1, 1888 (25 ibid., 165), the grade of lieutenant general was discontinued and merged in that of General of the Army, which was conferred upon Lieut. Gen. P. H. Sheridan, and ceased to exist at the death of that officer on August 5, 1888.

No other provision relating to the grade of General of the Army being contained in any subsequent statute, it seems clear that section 1096 became inoperative and was in effect repealed when the office of General of the Army became extinct. See also *U. S. Compiled Statutes,* 1901, vol. 1, p. 806.

II.

"If [Sec. 1094 is] Repealed, What Provision, if Any, is Relied upon as the Basis for Applying the Terms of Section 1096 to the Claim Made in This Case?"

The appellant's additional brief not having been filed at the time this brief is printed, we are not informed of the position counsel will take other than as stated in their original brief with respect to the second question suggested by the court. In their original brief, however, and at the hearing of the case in the court below, the claim was based upon that clause of the Navy personnel act of March 3, 1899 (30 Stat., 1024, 1025), providing that the pay and allowances of the Admiral "shall be the same as those received by the last General of the United States Army," and upon the thirteenth section of the same act assimilating the pay and allowances of officers of the line of the Navy to that of officers of corresponding rank in the Army.

In view of the fact that the first of these provisions relates exclusively to the pay and personal allowances of the Admiral, and that it will scarcely be contended that an aid is "an allowance," within the meaning of the term as there used, it is manifest that the assimilating clause of the personnel act is the sole basis relied upon for applying the terms of section 1096 to the claim made in this case. As that clause, however, merely extends the same pay and allowances to officers of the Navy "*as are*

or may be provided by or in pursuance of law for officers of corresponding rank in the Army," it is quite manifest that it can not be invoked as a ground for the allowance of pay to a naval officer based upon the pay of an *office* in the Army which has ceased to exist.

As stated in our original brief (p. 4) " There is no such rank as ' aid ' known to the law in either the Army or the Navy. Nor is there any provision of law either authorizing in general terms the appointment of aids to the Admiral of the Navy or providing that they shall receive higher rank or extra pay while performing such service."

Ample confirmation, if such be needed, that Congress did not intend either to authorize the appointment or to provide additional compensation for officers performing the duties of an aid to the Admiral is afforded by the so-called " New Navy pay act " of May 13, 1908 (35 Stat., 128).

This enactment repealed the provisions of the personnel act relating to pay and allowances of the Admiral, as well as the assimilating clause of the thirteenth section, and provided an entirely new and wholly different basis of pay by which the annual pay of each grade throughout the Naval Service, including that of Admiral, is specifically fixed, wholly without reference and entirely irrespective of Army pay. No provision whatever is made by this latest enactment for the appointment or compensation of an aid to the Admiral, although com-

pensation is specifically provided for aids to rear admirals in the following terms:

> Aids to rear admirals embraced in the nine lower numbers of that grade shall each receive one hundred and fifty dollars additional per annum, and aids to all other rear admirals two hundred dollars additional per annum each.

The action of Congress in thus expressly providing pay for aids to rear admirals, and its omission to make any provision whatever for pay for aids to the Admiral, can be reconciled only upon the theory that the appointment of aids of the latter class had not been previously authorized by existing legislation.

JOHN Q. THOMPSON,
Assistant Attorney General.

FREDERICK DEC. FAUST,
Attorney.

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WOOD *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 71. Argued November 16, 17, 1911.—Decided April 1, 1912.

An officer of the Navy serving as aid to the Admiral under the provisions of the acts of March 2 and 3, 1899, cc. 378 and 421, 30 Stat. 995, 1024, 1045, is not entitled under the assimilating provisions of § 13 of the Navy Personnel Act of March 3, 1899, c. 413, 30 Stat. 1007, to the higher rank and pay provided under § 1019, Rev. Stat., for aids to the General of the Army, irrespective of the actual rank held by such naval officer during his period of service as such aid.

By the proviso to § 1094, Rev. Stat., which became effective prior to 1888, the office of General of the Army created by § 1096, and the rank and incidents thereto ceased, and were revived by the act of June 1, 1888, 25 Stat. 165, c. 338, only for the period of the life of General Sheridan, and again ceased on his death, since which time there is no officer of the Army to which pay of aids to the Admiral of the Navy can be assimilated under § 13 of the Navy Personnel Act of 1899.

An incongruity resulting from an omission in an act of Congress does not justify the courts exercising legislative power to create an office or pay therefor, and so *held* that the fact that the pay of all other naval officers, including aids to Rear Admirals, is assimilated to that of corresponding officers of the Army except aids to the Admiral is a matter that must be corrected, if it is to be corrected, by Congress and not by the courts.

44 Ct. Cl. 611, affirmed.

THE facts, which involve the construction of the acts of Congress relating to pay of aids to the Admiral of the Navy, are stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* was on the brief, for appellant.

Mr. Assistant Attorney General Thompson, with whom

Mr. Frederick De C. Faust, Attorney, was on the brief, for the United States.[1]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The office of Admiral of the Navy was reëstablished by the act of March 2, 1899, 30 Stat. 995, reënacted in identical terms by a portion of the Naval Appropriation Act of March 3, 1899, 30 Stat. 1045, c. 421. By another provision of the same act, 30 Stat. 1024, 1025, the Admiral was given the same pay and allowances "as had been received by the last General of the United States Army.

"From October 17, 1904, until February 29, 1908, the claimant performed the duties prescribed by an order of the Secretary of the Navy, dated October 1, 1904, which directed him to report to the Admiral of the Navy, . . . President of the General Board, . . . for duty as aid to the Admiral of the Navy, and for duty in connection with the general board." During the period within which these services were performed the claimant received the pay belonging to his rank in the Navy, which, for the earlier portion of the time, was that of Lieutenant Commander and during the remainder of the time that of Commander. He demanded the pay and allowances

[1] On January 31, 1912, the court directed additional briefs to be filed upon the following questions:

Did § 1096 of the Revised Statutes cease to be operative when the office of General of the Army became extinct? In other words, were not the provisions of that section repealed by force of the proviso of § 1094, Revised Statutes?

If repealed, what provision, if any, is relied upon as the basis for applying the terms of § 1096 to the claim made in this action?

In compliance with this order an additional brief was filed on behalf of the appellant on February 15, 1912, and on behalf of the United States on February 13, 1912.

of a Captain of the Navy, upon the theory that the Admiral of the Navy corresponded in rank with the General of the Army, that by Rev. Stat., § 1096, the General of the Army was entitled to aids, who received increased compensation as such aids by reason of the pay attached to the higher rank conferred upon them while serving as aids to the General, which higher pay the aid to the Admiral became entitled to receive by virtue of the clause of § 13 of the Naval Personnel Act of March 3, 1899, 30 Stat. 1004, 1007, c. 413, assimilating the pay of officers of the Navy to that of officers of the Army.

Section 1096, Rev. Stat., relied upon in connection with the assimilating provision just referred to is as follows:

"SEC. 1096. The General may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry."

This appeal was taken from a judgment of the Court of Claims dismissing the claim.

Putting aside immaterial considerations, the question upon which the controversy turns is this: In March, 1899, when the office of Admiral was re-created, were the provisions of § 1096, Rev. Stat., existing or had they been repealed, thereby causing it to come to pass that there was no law concerning aids to the General of the Army upon which the assimilating provisions of the act of 1899 could operate? We say this is the fundamental question, because it is patent that the act of 1899 which re-created the office of Admiral did not in and of itself provide for aids to that officer or fix extra compensation for such services, and therefore the right here asserted must depend exclusively upon the existence of some law providing for aids to the General of the Army and their pay, which in virtue of the application of the assimilating statute became operative as to aids to the Admiral.

While by § 1094, Rev. Stat., it was provided that the Army of the United States should consist, among other officers, of "one General," the section concluded with the following:

"*Provided*, That when a vacancy occurs in the office of General or Lieutenant-General such office shall cease, and all enactments creating or regulating such offices shall, respectively, be held to be repealed."

It is not questioned that § 1096, Rev. Stat., was a regulation concerning the office of General of the Army, and it is not disputed that that section was repealed prospectively by the proviso to § 1094 above quoted, a repeal which became operative when the event provided for the cessation of the office of General occurred. It is, further, not disputed that years before the re-creation of the office of Admiral in 1899 the result provided for in the proviso to § 1094 had taken place, and hence that § 1096, concerning aids to the General of the Army, had ceased to exist as the result of the non-existence of the grade of General of the Army to which the provisions of that section applied.

The primary contention is that § 1096 was revived as the result of the act of June 1, 1888, 25 Stat. 165, c. 338, by virtue of which Lieutenant General Sheridan was made for life the General of the Army. The secondary proposition is that the provisions of the section which it is contended were thus revived remained in force (although in abeyance) after the death of General Sheridan and despite the fact that the act of 1888, which provided for his appointment as General declared that the grade should cease on his death. The contention, however, in reason rests upon a plain misconception of the act of 1888, since it but insists that while the provisions of that act only revived the grade of General for a limited and specified purpose, nevertheless the effect of the act was to revive incidental provisions of law concerning that

office so as to cause them to continue to exist after the period during which alone the statute contemplated they should be in existence. But so to construe the statute would divide it against itself, would presuppose that it contemplated that an effect should arise from its enactment plainly at war with the purpose which its text manifests Congress intended to accomplish by its adoption. When it is considered that the grade of General of the Army had ceased to exist long prior to the act of 1888 and that the statutory incidents regulating that office, including § 1096, Rev. Stat., had also passed out of existence, we think it results that the provisions of the act of 1888 reviving the office of General and the incidents relating to that office were all controlled by the limitation of time which that act imposed. In other words, we think that the office and its incidents were but revived for the sole purposes and for the limited period specified, and none other, and therefore no subject to which that act related can be said to have been generally reënacted so as to survive the limitations which the act itself expressly contemplated.

The failure by Congress during the many years which have elapsed since the re-creation of the office of Admiral to make any provision concerning the pay of aids to that officer gives rise to the assumption of a legislative construction in accord with the view which we have expressed. The matter is not however left to mere inference resulting from silence, since although Congress in what is known as the New Navy Pay Act of May 13, 1908, 35 Stat. 127, c. 166, in terms specifically provided for the pay of every officer in the Navy, including the Admiral and embracing extra compensation to aids to Rear Admirals, made no provision whatever for compensation for services which might be rendered by an officer acting as aid to the Admiral. The incongruity, if any, which it is suggested must result from providing for extra com-

pensation for an aid to a Rear Admiral and none for aids to the higher officer, the Admiral, if admitted, would be but the consequence of legislative omission, and would not justify the exertion of judicial power for the purpose of re-creating a provision of law, concerning aids to the General of the Army, which has long since ceased to exist, in order to afford a subject upon which the assimilating provision of the Naval Personnel Act of 1899 might operate.

Affirmed.